HOT TOPICS IN IMMIGRATION DETENTION

CASELAW UPDATE

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1. This paper covers five – unrelated – topics of current interest:
    a. Detention in disputed age cases;
    b. Abuse of process;
    c. Venue for post-release detention challenges;
    d. Costs in *Hardial Singh* challenges;
    e. Detention in the prison estate.

DETENTION ACTION V SSHD (EHRC INTERVENING)

2. Nathalie Lieven QC will update the seminar on the current position in the *Detention Action* litigation. References are as follows:
    a. Substantive judgment of Ouseley J: [2014] EWHC 2245 (Admin)
    b. Judgment of Ouseley J on relief: [2014] EWHC 2525 (Admin)
    c. Judgment of the Court of Appeal on relief: [2014] EWCA Civ 1270.

3. For ILPA members, there are extensive resources relating to these proceedings on the ILPA website:

    a. Judgments, evidence from the proceedings, case notes, and precedent grounds of challenge: http://www.ilpa.org.uk/resource/29053/judgment-in-detention-action-v-secretary-of-state-for-the-home-department-2014-ewhc-2245-admin-updat.

    b. Detention Action's note of a meeting with the Home Office about the detained fast track following the decision in the Detention Action case, 26 August 2014: http://www.ilpa.org.uk/resource/29231/detention-actions-note-of-a-meeting-with-the-home-office-about-the-detained-fast-track-following-the

    c. Court Orders staying removal (issued before the Court of Appeal gave judgment in the relief appeal): http://www.ilpa.org.uk/resource/29264/court-orders-staying-removal-in-light-of-pending-judgment-in-rdetention-action-v-secretary-of-state-

AGE DISPUTE CASES

4. The exercise of detention powers in disputed age cases is subject to the policy guidance in Section 55.9.3.1 of EIG Chapter 55, which is in the following terms:

> **55.9.3.1. Individuals claiming to be under 18**
>
> The guidance in this section must be read in conjunction with the *Assessing Age* Asylum Instruction (even in non-asylum cases). You may also find it useful to consult Detention Services Order 14/2012 on managing age dispute cases in the detention estate.
>
> The Home Office will accept an individual as under 18 (including those who have previously presented themselves as an adult) unless one or more of the following categories apply (please note this does not apply to individuals previously sentenced by the criminal courts as an adult):
>
> A. There is credible and clear documentary evidence that they are 18 or over.
>
> B. A Merton compliant age assessment by a local authority is available stating that they are 18 years of age or over.
>
> C. Their physical appearance / demeanour very strongly suggests that they are significantly over 18 year of age and no other credible evidence exists to the contrary.
>
> D. The individual:
>
> - prior to detention, gave a date of birth that would make them an adult and/or stated they were an adult; and
> - only claimed to be a child after a decision had been taken on their asylum claim; and
> - only claimed to be a child after they had been detained; and
> - has not provided credible and clear documentary evidence proving their claimed age; and
> - does not have a Merton compliant age assessment stating they are a child; and
> - does not have an unchallenged court finding indicating that they are a child; and
> - physical appearance / demeanour very strongly suggests that they are 18 years of age or over.
>
> (all seven criteria within category D must apply).
>
> If an individual claims to be a child in detention the decision on whether to maintain detention or release should be made as promptly as possible.
>
> If one or more of the above categories apply, the following actions, where appropriate, should be completed:

- Only if C or D apply: Before a decision is taken, the assessing officer's countersigning officer (who is at least a CIO / HEO must be consulted to act as a 'second pair of eyes'. They must make their own assessment of the individual's age. If the countersigning officer agrees, the individual should be informed that their claimed age is not accepted.

- All cases: Form IS.97M must be completed, signed by the countersigning officer, served on the individual and a copy sent to DEPMU. Form BP7 (ASL.3596) must also be completed,
- Enforcement Instructions and Guidance
- signed and held on file.

- All cases: The individual's date of birth within the 'Person Details' screen on CID must be updated to reflect the Home Office's assessed date of birth – not the individual's claimed date of birth. Failure to complete this action will result in DEPMU refusing to allocate detention space in adult accommodation. For further guidance refer to section '3.3 Updating the individual's case file and CID' of the Assessing age AI.

- All cases: If officers receive relevant new evidence, they should promptly review any previous decision to treat an individual as an adult.

5. The starting point, therefore, when detention is under consideration in a disputed age case is that where an individual claims to be a child the Secretary of State will treat that person as a child (and so he or she will not ordinarily be detained) unless:

(1) there is 'credible and clear' documentary evidence that the person is over eighteen;
(2) a '*Merton* compliant' age assessment by a local authority 'is available' stating that they are 18 years of age or over;
(3) the person's appearance or demeanour suggests he or she is 'significantly' older than eighteen;
(4) he or she has previously claimed to be an adult, and a number of other criteria are satisfied.

(a) Documentary evidence

6. *Assessing Age* (Section 6) gives guidance on the approach caseworkers should take when deciding whether to accept documentary evidence as proof of a person's claimed age. The problematic nature of apparently official documentation from some countries is addressed

in the Immigration Appeal Tribunal's decision in *Tanveer Ahmed v Secretary of State for the Home Department* [2002] UKIAT 439; [2002] Imm AR 318 at [31].

(b) Local authority age assessments

7. EIG 55.9.3.1.B provides that, for detention purposes, a young person who is claiming to be a child will be treated as an adult where a '*Merton* compliant' age assessment by a local authority 'is available' stating that he or she is 18 years of age or over.

(i) A '*Merton* compliant' age assessment by a local authority

8. The decision of the Court of Appeal (Sir Anthony May P) in *R (FZ) v Croydon LBC* [2011] EWCA Civ 59 at [2]-[3] contains a helpful summary of what is meant by "*Merton* compliance" (see further *R (B) v Merton London Borough Council* [2003] EWHC 1689 (Admin)):

> [2] […] Some young people may be obviously and uncontroversially children. Others may accept that they are adult. It is for those whose age may objectively be borderline, between perhaps 16 and 20, that an appropriate and fair process of age determination may be necessary. A process has developed whereby an assessment is undertaken by two or more social workers, trained for that purpose, who conduct a formal interview with the young person at which he is asked questions whose answers may help them make the assessment. It is often necessary for there to be an interpreter. The young person may or may not be able to establish or indicate his age by producing documents, which themselves may require translation.
>
> [3] In *R (B) v Merton London Borough Council* [2003] EWHC 1689 (Admin), [2003] 4 All ER 280 Stanley Burnton J gave guidance in judicial review proceedings on appropriate processes to be adopted when a local authority is assessing a young person's age in borderline cases. The assessment does not require anything approaching a trial and judicialisation of the process is to be avoided. The matter can be determined informally provided that there are minimum standards of inquiry and fairness. Except in clear cases, age cannot be determined solely from appearance. The decision-maker should explain to the young person the purpose of the interview. Questions should elicit background, family and educational circumstances and history, and ethnic and cultural matters may be relevant. The decision-maker may have to assess the applicant's credibility. Questions of the burden of proof do not apply. The local authority should make its own decision and not simply adopt a decision made, for instance, by the Home Office, if there has been a referral. It is not necessary to obtain a medical report, although paediatric expert evidence is sometimes provided in these cases, and there is some

> difference of view as to its persuasiveness in borderline cases. If the decision-maker forms a view that the young person may be lying, he should be given the opportunity to address the matters that may lead to that view. Adverse provisional conclusions should be put to him, so that he may have the opportunity to deal with them and rectify misunderstandings. The local authority is obliged to give reasons for its decision, although these need not be long or elaborate. This decision and its guidance have led to the development of what is sometimes referred to as a "Merton compliant" interview or process.

9. In *FZ* the Court of Appeal put two matters beyond doubt:

   a. First, some kind of "minded-to" procedure is necessary where the local authority reaches a provisional decision to disbelieve an applicant and before the decision is finalised: "*it is axiomatic that an applicant should be given a fair and proper opportunity, at a stage when a possible adverse decision is no more than provisional, to deal with important points adverse to his age case which may weigh against him*" (see at [21]-[22

   b. Second, a *Merton*-compliant assessment requires that the young person who is being assessed has the opportunity to have an appropriate adult present: see at [23]-[24].

10. A helpful overview of fourteen propositions emerging from the authorities on age disputes is set out in the judgment of Mr Simon Picken QC in *VS v The Home Office* [2014] EWHC 2483 (QB) at [78]:

> [78] Drawing on [counsel's] helpful summary of the *Merton* guidelines in her skeleton argument […] albeit with some modifications in relation to the authorities which were cited, the relevant guidelines can be summarised as follows:
>
> (1) The purpose of an age assessment is to establish the chronological age of a young person.
>
> (2) The decision makers cannot determine age solely on the basis of the appearance of the applicant, except in clear cases: *Merton* per Stanley Burnton at [37].
>
> (3) Physical appearance is a notoriously unreliable basis for assessment of chronological age: *NA v LB of Croydon* [2009] EWHC 2357 (Admin) per Blake J at [27].

(4) Demeanour can also be notoriously unreliable and by itself constitutes only *"somewhat fragile material"*: *NA* per Blake J at [28]. Demeanour will generally need to be viewed together with other things. As Collins J stated in *A and WK v London Borough of Croydon & Others* [2009] EWHC 939 (Admin) at [56]: "… *What is meant by the observation that he appeared to be comfortable in his body? It is difficult to follow what this does mean and how a discomfort with a changing body can manifest itself. Nonetheless, the assessment of his physical appearance and demeanour coupled with the discrepancies and inconsistencies in his account of how he knew his age could justify the conclusion reached."*

(5) There should be *"no predisposition, divorced from the information and evidence available to the local authority, to assume that an applicant is an adult, or conversely that he is a child"*: see *Merton* per Stanley Burnton at [37-38]. The decision, therefore, needs to be based on particular facts concerning the particular person.

(6) There is no burden of proof imposed on the applicant to have to prove his or her age in the course of the assessment: see *Merton* per Stanley Burnton at [38]. This is confirmed also by *R(CJ) v Cardiff CC* [2011] EWCA Civ 1590 [at paragraph [21]].

(7) In similar vein, benefit of any doubt is always given to the unaccompanied asylum-seeking child since it is recognised that age assessment is not a scientific process: see *A and WK* per Collins J at [40].

(8) The two social workers who carry out the age assessment should be properly trained and experienced: *A and WK* per Collins J at [38].

(9) The applicant should have an appropriate adult, and should be informed of the right to have one with the purpose of having an appropriate adult also being explained to the applicant: see *FZ* per Sir Anthony May P at [23-25]; *J* per Coulson J at [14]; and *AAM* per Lang J at [94(a)].

(10) The child should be told the purpose of the assessment see *FZ* per Sir Anthony May P at [3] (summarising *Merton*).

(11) The decision *"must be based on firm grounds and reasons"* for it *"must be fully set out and explained to the applicant"*: *A and WK* per Collins J at [12].

(12) The approach of the assessors must involve trying *"to establish a rapport with the applicant and any questioning, while recognising the possibility of coaching, should*

be by means of open-ended and not leading questions". It is *"equally important for the assessors to be aware of the customs and practices and any particular difficulties faced by the applicant in his home society"*: *A and WK* per Collins J at [13].

(13) It is *"axiomatic that an applicant should be given a fair and proper opportunity, at a stage when a possible adverse decision is no more than provisional, to deal with important points adverse to his age case which may weigh against him"*: *FZ* per Sir Anthony May P at [21]. It is not sufficient that the interviewing social workers withdraw to consider their decision, and then return to present the applicant *"with their conclusions without first giving him the opportunity to deal with the adverse points"*: [22]. See also *J* per Coulson J at [15]; *AAM* per Lang J at [94(c)]; and *Durani* per Coulson at [84-87] (in particular, at [84]: *"Elementary fairness requires that the crucial points which are thought to be decisive against an applicant should be identified, in case the applicant has an explanation for them"*).

(14) Assessments devoid of details and/or reasons for the conclusion are not compliant with the *Merton* guidelines; and the conclusions must be *"expressed with sufficient detail to explain all the main adverse points which the fuller document showed had influenced the decision"* (*FZ* per Sir Anthony May at [22]).

(ii) '. . . *is available*'

11. The requirement in EIG 55.9.3.1.B that a *Merton* compliant assessment be 'available' raises the question of what the Secretary of State must do to satisfy herself of this.

12. The prevailing approach is that of Coulson J in *R(J) v Secretary of State for the Home Department* [2011] EWHC 3073 (Admin) at [31]–[32], adopted and approved by Lang J in *AAM (A child) v Secretary of State for the Home Department* [2012] EWHC 2567 (QB) at [110]–[111]:[1]

    a. There is '*an independent obligation*' on the relevant official to consider the assessment and to reach his or her own conclusion as to whether it is *Merton* compliant.[2] The relevant Home Office official cannot assume that an age assessment conducted by a local authority is *Merton* compliant. He or she is expected to '*carry out an evaluation of the age assessment and satisfy [him or*

[1] See also *Durani v Secretary of State for Home Department & Anor* [2013] EWHC 284 (Admin) at [90] and *HXT v Secretary of State for the Home Department* [2013] EWHC 1962 (QB) at [18].
[2] *R(J)* at [31].

herself] both that it is Merton-compliant and that its conclusion on age is reliable . . . '[3]

b. The official's conclusion is subject to the supervisory jurisdiction of the court 'on traditional public law grounds.' Whether an assessment is *Merton* compliant is not an objective fact on which there can only be one correct answer. The official must make a judgment on whether the assessment is *Merton* compliant. This is a question upon which views may differ,[4] albeit that in some cases there will only be room for one view (see *R(J)* at [18]).

13. On this approach, a failure by an official to consider whether an age assessment was *Merton* compliant before deciding to detain, or a decision that an age assessment was *Merton* compliant which was not reasonably open to the decision maker, would be a material error of law which rendered detention unlawful.[5]

14. The issue arose most recently in *VS v The Home Office* [2014] EWHC 2483 (QB). In that case, the Home Office had not considered a full copy of the local authority age assessment and satisfied itself as to *Merton* compliance. It had received a *pro forma* document from Kent County Council which had a tick box table purporting to confirm compliance with the various obligations arising from the *Merton* jurisprudence.

15. In his decision, the Deputy Judge (Simon Picken QC) attached great weight to the requirement in EIG 55 to take account of the guidance in *Assessing Age*, which contemplated the Home Office accepting an assessment as *Merton* compliant without considering the full assessment report. His reasoning on this issue is at [128]-[130]:

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[3] *AAM* at [107]–[108]. *Assessing Age*, at Section 5, includes guidance on what constitutes '*Merton* compliance' and the steps caseworkers should take to satisfy themselves of this. It envisages, at 5.3, that in some cases a local authority may be reluctant to provide a complete copy of the assessment and sets out the approach to follow where this occurs.

[4] *AAM* at [110]. This is questionable; *Merton*-compliance means, in essence, compliance with the requirements of fairness, rationality, and enquiry which follow from general principles of public law. These are questions of law, not fact.

[5] NB: This approach also appears to reflect the position taken by Collins J in *A & WK v Kent CC & Ors* [2010] 1 FLR 193, [2009] EWHC 939 (Admin) at [38]-[39], but in a subsequent case Collins J suggested that these comments may have gone "*too far*": *Hosseiny v Kent & SSHD* [2011] EWHC 1924 (Admin). Since *Hosseiny*, however, the approach set out here has been followed on a number of occasions.

[128] […] looking at the structure of paragraph 5.3, the 'Assessing Age' guidance must be contemplating that something less than a full Merton-compliant age assessment document can suffice. On that basis, [counsel]'s submission fails, although, as I say, it does not follow that the 'Age Assessment Results' document provided to the Defendant by Kent CS in the present case is sufficient. Paragraph 5.3 starts by stating that "Case owners should request a full copy of the local authority's age assessment and confirmation from the local authority that it has been carried out in compliance with the guidelines in the Merton case". If matters stopped there, there would be no doubt that only a full Merton-compliant age assessment document will do. However, matters do not stop there. Instead, after a reference to *A & WK* and to Collins J saying in that case that "Only if the full report is available can it be seen whether there are any apparent flaws in it and whether it is truly Merton compliant", the paragraph goes on to say this (as always, the emphasis is in the original):

"Case owners should discuss with the relevant local authority and obtain in writing, ***at the very least*** their assessment conclusion, the reasons on which their conclusion is based and an assurance that their assessment complies with the local authority's assessment policy and the guidelines in the Merton case."

This seems to me to make it abundantly clear that the guidance contemplates that something less than a full Merton-compliant age assessment document will be sufficient. If the position were otherwise, then, I fail to see why there would be any need for this paragraph at all: matters would simply rest with the statement earlier on, supported by the A & WK case dictum, that a full Merton-compliant age assessment document is needed. In addition, the words in bold ("at the very least") make absolutely no sense if the position is that nothing less than a full Merton-compliant age assessment document will suffice.

[129] This conclusion is sufficient to dispose of [counsel]'s submission that a full Merton-compliant age assessment document is needed, and nothing short of that. It does not, however, resolve the question of whether the 'Age Assessment Results' document provided to the Defendant by Kent CS in the present case is sufficient for the purposes of the 'Assessing Age' guidance. That requires me to consider what is actually required and not merely what is not required. My answer to this question is that, as the paragraph set out above itself states, what is required from the local authority (here, Kent CS) is, first, "their assessment conclusion", secondly "the reasons on which their conclusion is based", and thirdly "an assurance that their assessment complies with the local authority's assessment policy and the guidelines in the Merton case".

[130] The question, then, is whether these three requirements were satisfied in the case of the 'Age Assessment Results' document in the present case. In my judgment, they were not, with the consequence that the Claimant's claim succeeds despite the fact that I have rejected the

> submission that nothing less than a full Merton-compliant age assessment document is sufficient. There is no difficulty in relation to the first and third requirements: in the case of the third requirement, not only because of the reference to Merton in the note at the foot of the page, but also because in the covering letter from Kent CS dated 17 July 2012 it was stated that the "Assessment was a full assessment as required by 'Merton'". The difficulty arises in relation to the second requirement, namely that there should "reasons on which their conclusion is based". I consider that [counsel] is right in her submission that merely placing a "Y" or an "N" next to a list of Merton factors on a pro forma does not entail the giving of "reasons on which" Kent CS's "conclusion is based" in circumstances where nowhere else in the 'Age Assessment Results' document is there anything which could properly be described as specific to the Claimant.

(iii) Challenges to local authority age assessments

16. Following *A v Croydon* [2009] UKSC 8, [2009] I WLR 2557 where a disputed minor challenges a local authority age assessment, the Court (or UT) may (and almost certainly will[6]) decide on age as a matter of fact, rather than limit itself to considering the lawfulness of the local authority assessment. The Secretary of State is not a party to such proceedings, so (absent a declaration *in rem*) is not bound by the Court's conclusion (albeit, sound reasons would be required for the SSHD to take a different view, and in practice this is unlikely to happen).

(c) Appearance and demeanour

17. An individual who is claiming to be a child will be treated as an adult where their physical appearance and/or demeanour "*very strongly suggests that they are significantly over 18 year of age and no other credible evidence exists to the contrary*". In such cases, it is a mandatory requirement that the decision be approved by a more senior officer acting as a "second pair of eyes".

(d) Prior claim to be an adult

18. Since November 2012 EIG 55.9.3.1 has included a fourth scenario in which a failed asylum seeker claiming to be a child will be treated as an adult. This arises where there was a prior claim to be an adult. All seven of the items identified in the bullet points under D must be made out before a person can be treated as an adult on this basis. Again, there is a requirement for a more senior official to act as a "second pair of eyes".

[6] *Kadri v Birmingham CC & SSHD* [2012] EWCA Civ 1432 at [52].

New evidence of age

19. In all cases, if the Home Office receives potentially material new evidence, the relevant official should 'promptly review any previous decision to treat an individual as an adult.'

Tribunal findings

20. As well as age-dispute JRs, judicial findings on age may arise in the context of immigration or asylum appeals. In such proceedings the Secretary of State is a party and, whilst not bound as a matter of law by specific factual findings, is unlikely to be able rationally to depart from them in the absence of further evidence calling them into question.[7]

The role of the court as primary fact-finder

21. Prior to the amendments made to IA 1971 by IA 2014, the statutory detention powers in the Immigration Acts were not expressed as being contingent on a person's age. The restrictions on detaining children were set out in published Home Office policy. In this context, where a person is detained following a lawful, but factually incorrect, conclusion by the SSHD that he or she is an adult, detention will not be unlawful: *AA v SSHD* [2013] UKSC 49, [2013] WLR 2224.[8] The argument in that case that s.55 BCIA 2009 compelled an assessment of age as a matter of fact by the Court was rejected, albeit Lord Toulson suggested that, on an application for *habeas corpus*, the Court's jurisdiction may be wide enough to extend to determining age for the purpose of ruling on the legality of detention (see at [51]-[54]).

22. Since the decision in *AA*, however, the power of detention in IA 1971, Schedule 2, para 16(2) has been qualified in terms which refer expressly to the age of the person being detained. Para 16(2) and para 18B of Schedule 2 now read:

> 16(2) If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs 8 to 10A or 12 to 14, that person may be detained under the authority of an immigration officer pending—
> (a) a decision whether or not to give such directions;

[7] See *Secretary of State for the Home Department v Danaie* [1997] EWCA Civ 2704; [1998] Imm AR 84.
[8] NB: *AA* is currently before the ECtHR.

(b) his removal in pursuance of such directions.

16(2A) But the detention of an unaccompanied child under sub-paragraph (2) is subject to paragraph 18B.

18B (1) Where a person detained under paragraph 16(2) is an unaccompanied child, the only place where the child may be detained is a short-term holding facility, except where—

(a) the child is being transferred to or from a short-term holding facility, or

(b) sub-paragraph (3) of paragraph 18 applies.

(2) An unaccompanied child may be detained under paragraph 16(2) in a short-term holding facility for a maximum period of 24 hours, and only for so long as the following two conditions are met.

(3) The first condition is that—

(a) directions are in force that require the child to be removed from the short-term holding facility within the relevant 24 hour period, or

(b) a decision on whether or not to give directions is likely to result in such directions.

(4) The second condition is that the immigration officer under whose authority the child is being detained reasonably believes that the child will be removed from the short-term holding facility within the relevant 24 hour period in accordance with those directions.

(5) An unaccompanied child detained under paragraph 16(2) who has been removed from a short-term holding facility and detained elsewhere may be detained again in a short-term holding facility but only if, and for as long as, the relevant 24 hour period has not ended.

(6) An unaccompanied child who has been released following detention under paragraph 16(2) may be detained again in a short-term holding facility in accordance with this paragraph.

(7) In this paragraph—

"relevant 24 hour period", in relation to the detention of a child in a short-term holding facility, means the period of 24 hours starting when the child was detained (or, in a case falling within sub-paragraph (5), first detained) in a short-term holding facility;

"short-term holding facility"has the same meaning as in Part 8 of the Immigration and Asylum Act 1999;

"unaccompanied child" means a person—

(a) who is under the age of 18, and

(b) who is not accompanied (whilst in detention) by his or her parent or another individual who has care of him or her.

23. Following these amendments, the questions whether a young person is (a) unaccompanied, and (b) a child, are statutory preconditions to the power of detention being exercised for more than 24 hours. They are also – it is suggested – hard edged questions of fact, and not matters of evaluative judgement. As such, it is suggested that in future there may be scope for challenges to the detention of age disputed young people

under para 16(2) of Schedule 2 on the basis that the Secretary of State's view on age is simply wrong.[9]

ABUSE OF PROCESS

24. Two decisions, one quite recent, the other less so, identify circumstances in which a challenge to the legality of immigration detention might be ruled an abuse of process. They arguably pull in different directions, and pose real risks for practitioners advising claimants in this area. The two cases are:

    a. *BA & Ors v Secretary of State for the Home Department* [2012] EWCA Civ 944, which considered the circumstances in which a civil claim for damages for false imprisonment might be an abuse of process if brought subsequent to judicial review proceedings which challenged removal, in which permission had been refused, and

    b. *Ashraf v Secretary of State for the Home Department* [2013] EWHC 4028 (Admin) (18 December 2013) which considered the circumstances in which a detention claim, brought at the same time as a removal challenge, the consequence of which was that proceedings took place before the Administrative Court rather than the Upper Tribunal, might be an abuse of process for lack of merit.

BA v SSHD

25. The key passages are in the judgment of Sir John Thomas P at [26] and [27]:

> [26] The principles applicable are well established and set out in *Johnson v Gore Wood*. Lord Bingham's judgment, at page 31, after referring to the principles in *Henderson v Henderson* sets out the general considerations – the need for finality and that a party should not be vexed twice. If a claim should have been raised in earlier proceedings, it might therefore well amount to an abuse of process. Whether it did should :
>
> > "be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing

[9] Cf *A v Croydon* [2009] UKSC 8, [2009] I WLR 2557 in which a similar conclusion was reached regarding local authority age assessments on the basis that age was a "precedent" or "jurisdictional" fact in relation to the provision of accommodation under s.20(1) Children Act 1989.

or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

[27] Although it is of paramount importance to stress that each case must be decided on this broad merits based approach, there are, in cases where an application has been made for judicial review by a person in detention challenging removal directions who also claims his detention is unlawful, some general factors to which a court will ordinarily have regard if further proceedings are brought after the refusal of permission.

(a) The question as to whether detention is lawful will be closely related to the removal directions and the time within which removal can be effected. This question raises issues which the Administrative Court is best placed to determine, whereas the quantum of damages can best be determined in the general list of the Queen's Bench Division or the Central London County Court or another County Court. Although it is plainly permissible to bring a claim for damages for immigration detention alone as an ordinary civil claim (see *ID* at Paragraphs 102-105), the efficient administration of justice favours issues of immigration law in such claims being determined by judges with experience of asylum and immigration law.

(b) Although a County Court or the High Court can transfer a claim to the Administrative Court when such issues arise (see paragraph 103 of *ID*), where a claim is brought on behalf of a person in detention pending removal challenging removal directions by an application for judicial review, then any claim in respect of detention said to be unlawful should also be brought in the judicial review proceedings, given the close relationship between the issues.

(c) That is because it is important in the overall public interest that all the issues in relation to the lawfulness of the removal directions and the legality of the detention are determined by the Administrative Court in one set of proceedings having regard to the overall business of the courts. It is not permissible to circumvent these objectives: see *Carter Commercial Developments Ltd v Bedford Borough Council* [2001] EWHC 669 (Admin) at paragraphs 32 and following. Moreover, enabling the claimant to litigate the issues in two sets of proceedings would unnecessarily place a significant and unjust burden on the Secretary of State.

(d) The importance of orderly case management under the Civil Procedure Rules is a highly relevant consideration: see Lord Woolf MR in *Clark v University of Lincolnshire and Humberside* [2000]1 WLR 1988 at paragraphs 34-36; and Chadwick LJ in *Securum Finance v Ashton* [2001] Ch 291 at paragraphs 34-5 and 52.

(e) The fact that in an ordinary action there will be disclosure will generally make no difference, as the Secretary of State is under a duty of candour in judicial review proceedings.

However any lack of time on a claimant's part to obtain the necessary evidence for a claim relating to unlawful detention will be material in considering whether there is an abuse of process.

(f) Where the Administrative Court has determined an issue or refused permission to bring a claim or advance an issue on a permission application, then even though that determination will not usually give rise to an issue estoppel, it is generally not permissible for the claim or issue to be re-litigated between the same parties in those proceedings or in fresh proceedings: see the authorities referred to by Simon J in *R (Ecopower UK Ltd) v Transport for London* [2010] EWHC 1683 (Admin) at paragraphs 19-22; *R(Opoku) v Principal of Southwark College and Others* [2003] 1 WLR 234 where Lightman J considered the circumstances in which grounds in respect of which permission had been refused could be raised at the full hearing.

26. In the "*unusual circumstances*" of BA's case, the Court ruled that the civil claim which was pursued was not an abuse of process, for the following reasons:

a. Funding difficulties had meant that the immigration and detention claims could not be pursued together: [29]-[30];

b. The position of child claimants, who had not been party to the earlier JR proceedings, had not been safeguarded: [31];

c. The nature of the claim (the judicial review claim had focussed on removal, not detention, albeit detention was mentioned): [32];

d. The claimants were not culpable: [33];

e. The letter before claim in the civil claim had been sent before the refusal of permission in the JR [34];

f. There was no unjust burden placed on the SSHD.

27. In *HHF v SSHD* [2012] EWHC 4261 (QB) Cranston J held that *BA* was not limited to cases in which permission to apply for judicial review had been refused. *HHF* was a case in which the earlier judicial review had been discontinued because the Claimant, acting in person, had failed to lodge documents with the Court. Cranston J said this:

> Mr Thomann [for the SSHD], who has come into this case, as I understand it, late, has submitted that the authority of BA is not confined to situations, as Ms Kilroy [for the Claimant] suggests, where a claimant has been refused permission. I agree that the principles established in BA, are more general and the factors set out at paragraph 27 of the judgment have wider applicability.

28. Nevertheless, the fact that the legality of the Claimant's removal directions were never considered by the Court, along with the circumstances which led to the claim being discontinued, informed Cranston J's view that an abuse argument would not succeed.

Ashraf v SSHD

29. *Ashraf* was a case in which a challenge was brought to removal directions in place against the Claimant, and at the same time, to the legality of the Claimant's detention. Ordinarily a removal challenge would be brought in the UT, but the detention element compelled issuing the claim in the Administrative Court. Cranston J held that, in such circumstances, where there was no "*obvious distinct merit*" to the detention element of the claim it may be an abuse of process (and potentially a matter for disciplinary action) to include the detention challenge.

30. The relevant passages of Cranston J's judgment are at [28]-[36]:

> [28] Ground 2 of the original claim, and ground 2 of the amended claim, have alleged unlawful detention. Ongoing detention must be reasonable and in accordance with law and policy: *Lumba* [2011] UKSC 12; [2012] 1 AC 245, [102]-[110], per Lord Dyson. Chapter 55.10 of the Enforcement Guidance and Instructions provides that unless there are exceptional circumstances among persons considered unsuitable for detention are "those suffering from serious mental illness which cannot be satisfactorily managed within detention [and] those where there is independent evidence that they have been tortured."
>
> [29]/[30] [Sets out basis of detention challenge, and Cranston J's reasons for rejecting them, including his assertion at [30] that "*In my view the claimant never had any basis for alleging unlawful detention.*"]

Lodging the judicial review in the Administrative Court

[31] At the outset I said that it could well be an abuse of process to file a judicial review in the Administrative Court, on the ground that it falls within the detention exception in the Lord Chief Justice's Direction on transfer of asylum/immigration judicial reviews to the Upper Tribunal, when there is no obvious distinct merit to that aspect of the claim.

[32] On 21 August 2013, the Lord Chief Justice gave a Direction in accordance with the power to make designated rules under Schedule 2, Part 1 of the Constitutional Reform Act 2005 and section 18 of the Tribunals, Courts and Enforcement Act 2007. With effect from 1 November 2013, the Direction specifies classes of case for the purpose of s 18(6) of the 2007 Act, in other words, cases which the Upper Tribunal can hear. Important among the cases specified is any application for permission to apply for judicial review or for judicial review which challenged a decision made under the Immigration Acts or otherwise relating to leave to enter or remain in the UK outside the immigration rules. This applies to a case in which permission to apply for judicial review was issued in the Administrative Court on or after 9 September 2013; a renewed oral permission application in relation to a case which had been refused on the papers on or after 9 September 2013; and an application issued in the Upper Tribunal after 1 November 2013. In Paragraph 3 of the Direction are exclusions in respect of any application which comprises or includes:

"i a challenge to the validity of primary or subordinate legislation (or of immigration rules);
ii a challenge to the lawfulness of detention (but an application does not do so by reason only of the fact that it challenges a decision in relation to bail)
iii a challenge to a decision concerning inclusion on the register of licensed Sponsors maintained by the United Kingdom Border Agency, or any authorisation of such Sponsors;
iv a challenge to a decision as to citizenship under the British Nationality Act 1981 or any other provision of the law for the time being in force which determines British citizenship, the status of a British national (Overseas), British Overseas citizenship or the status of a British subject;
v a challenge to a decision made under or by virtue of section 4 (accommodation centres) or Part VI (support for asylum seekers) of the Immigration and Asylum Act 2002
vi a challenge to a decision made under Part II (accommodation centres) or Part III (other support and assistance) of the Nationality, Immigration and Asylum Act 2002
vii a challenge to a decision of the Upper Tribunal
viii a challenge to a decision of the Special Immigration Appeals Commission; or
ix an application for a declaration of incompatibility under section 4 of the Human Rights Act 1998."

[33] Part 4 of The Tribunal Procedure (Upper Tribunal) Rules 2008, SI 2008 No 2698 (as amended) concerns judicial review in the Upper Tribunal. The Practice Directions, Immigration Judicial Review in the Immigration and Asylum Chamber of the Upper Tribunal ("the Practice Directions"), were made in the exercise of powers conferred by the Tribunals, Courts and Enforcement Act 2007. These were amended on 1 November 2013. Part 5 concerns applications which challenge removal and is to be read together with Part 4, which relates to urgent applications. The Practice Directions are supplemented by a Practice Statement, dated 1 November 2013. Paragraph 2.1 records that an application for permission to bring proceedings may be made direct to the Upper Tribunal where the application is designated as an immigration matter in the Lord Chief Justice's Direction. Where an application is made to the High Court, on a matter which falls within the Lord Chief Justice's Direction, it will be transferred to the Upper Tribunal to be dealt with by that Tribunal. The High Court may decide in the exercise of its discretion under section 31A(3) of the Senior Courts Act 1981 to transfer certain judicial reviews to the Upper Tribunal. Those, too, will follow this procedure for transfer.

[34] The underlying purpose of the changes is to reduce pressure on the Administrative Court so that it can properly consider the most serious cases, and to ensure that the more routine immigration cases, including challenges to removal directions, are determined by the specialist judges in the Upper Tribunal. Since most of the cases in which there is a removal direction involve detention, there must be a concern that if applications are lodged in the Administrative Court, and routinely include a claim that detention is unlawful, the changes introduced from 1 November 2013 will have little practical effect. By inclusion of a challenge to detention the High Court will be seized of the matter, regardless of how weak that claim for detention may be. I accept Ms Bretherton's submissions that it should not be possible to circumvent the rules requiring challenges to removal directions to be issued in or transferred to the Upper Tribunal by the inclusion of an unmeritorious unlawful detention claim.

[35] It seems to me that to lodge a challenge to removal in the Administrative Court, including a ground going to the lawfulness of detention, when there is no obvious distinct merit in that aspect, could well constitute an abuse of process by the lawyers engaged in the case. The case can be transferred to the Upper Tribunal under section 31A(3) of the Senior Courts Act 1981 and, when possible within the time constraints, this will generally be done. The abuse of process itself can be addressed within the framework established in ***R (on the application of Hamid)*** *v* ***Secretary of State for the Home Department*** [2012] EWHC 3070 (Admin); [2013] CPR 6 and the cases following it. Cost penalties are another possibility: e.g., CPR 44.3(4)(a).

[36] In this case [counsel for the SSHD] submitted that the detention aspect of this case was hopeless. There was no proper claim for unlawful detention. The reality of this case is that it is a challenge to the removal directions and has nothing to do with a challenge to detention.

> That, in her submission, was demonstrated by the letter sent by the claimant's representatives on 18 November 2013, in which no reference was made to unlawful detention. What in my view just saves the detention challenge from being without obvious distinct merit is Dr Goldwyn's report, or at least the circumstances in which it arrived with the claimant's representatives on 18 November, when he was to be removed the following day. As I have said Dr Goldwyn's report must be considerably discounted in light of the reliance upon the discredited accounts of the claimant. However, she did raise concerns about the effect on the claimant of detention. Putting those concerns alongside Judge Sacks' findings, and the claimant's immigration factual summary, should have rung alarm bells that there was no obvious distinct merit to an unlawful detention claim. However, the report arrived late in the day and the grounds had to be hurriedly drafted. On this occasion I do not find that the unlawful detention aspect of the claim constitutes an abuse of process. Some may consider this to be unduly generous.

Comment

31. The decisions in *BA* and in *Ashraf* appear to pull in different directions and, particularly given the pressured circumstances in which challenges to RDs are often commenced, taken together, may confront practitioners with real difficulties. On the one hand, a failure to pursue a meritorious detention challenge at the same time as a challenge to RDs without good reason could, following *BA*, result in a subsequent detention claim being struck out as an abuse (with the representative facing potential liability in negligence). On the other hand, pursuit of a detention challenge alongside a challenge to RDs could, on one reading of *Ashraf*, result in serious sanctions being visited upon representatives if the detention aspect of the claim is found to lack 'obvious distinct merit'.

32. Where it is proposed to withdraw JR proceedings, claimants can protect themselves from the consequences of *BA* by seeking an undertaking from the Secretary of State, recorded in the preamble to a consent order, that no abuse point will be taken if a civil claim challenging detention is in due course brought. Great care must be taken to ensure any agreement is appropriately expressed.

33. As to the decision in *Ashraf*, a number of points can be made:

    a. First, the guidance on the consequences of bringing a claim that lacks "*obvious distinct merit*" is *obiter*. Mr Ashraf's claim was not such a case.

b. Second, the judge considered that Mr Ashraf's claim did not lack obvious distinct merit, notwithstanding he clearly thought it was very weak;

c. Third *Ashraf* cannot change the threshold for JR permission, which is simply arguability.[10]

d. A JR claim is not abusive just because it is held to be unarguable.

e. It would be very surprising if the simple fact of challenging removal made it harder to challenge the legality of detention than would otherwise be the case. If a detention challenge, brought in isolation, would not be an abuse of process it cannot be the case that it becomes abusive simply because it is raised at the same time as a removal challenge.

f. The reference to "*distinct*" merit cannot mean merit "*distinct*" from the merit of the removal challenge. Where there are grounds for alleging a proposed removal is unlawful, these may be highly material to (or, indeed, determinative of) a challenge to the legality of detention.

g. *Ashraf* appears to be directed to claims where a baseless and/or unparticularised detention challenge is used as a pretext for issuing a claim in the Administrative Court that should have been issued in the Upper Tribunal. It is suggested it should be strictly limited in its application to such cases. Practitioners can guard against the risks arising from *Ashraf* by ensuring that, where removal and detention are challenged together, the detention challenge is properly evidenced and pleaded in appropriate detail, with reference to the relevant legal principles.

VENUE FOR POST-RELEASE CHALLENGES: SWARAN & DK

[10] *IRC v Federation of Self-Employed and Small Businesses* [1982] AC 617 *per* Lord Diplock at 644A: 'If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief.'

34. The Administrative Court has made very clear in recent months that, in light of the pressures it faces, post-release claims should ordinarily be transferred to / issued in the QBD (or, as the case may be, the County Court). Thus, in *Swaran v SSHD* [2014] EWHC 1062 (Admin), Dingemans J said this at [30]-[34]:

> 30 The real relief sought in this action is a claim for damages for wrongful detention. Claims for damages alone may not be brought in the Administrative Court, see CPR 54.3(2) (*"a claim for judicial review may include a claim for damages … but may not seek such a remedy alone"*) and *D and others v Home Office [2005] EWCA Civ 38; [2006] 1WLR 1003* at paragraphs 58 and 105. In this case the Claimant claimed a declaration that the past detention was unlawful so that the action was properly constituted pursuant to CPR 54.3(1) , but in reality the claim for a declaration added nothing to the claim for damages.
>
> 31 It is important not to encourage arid disputes about the Court in which disputes should be properly commenced. On the other hand it is relevant to note that the Administrative Court seeks to make speedy decisions auditing the legality of decision making. The procedures of the Administrative Court are not best suited to determine contested historic events where disclosure and cross-examination of witnesses will be relevant.
>
> […]
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> 33 As is well known, the Administrative Court is very heavily listed. It would be unfortunate if, as a result of recent changes made to the allocation of business between the Administrative Court and the Upper Tribunal (Immigration and Asylum Chamber), cases auditing the legality of current decision making were replaced by actions which were in reality claims only for damages for wrongful detention well within the jurisdiction of the County Court.
>
> 34 The position is obviously different in circumstances where there is a challenge to ongoing detention, see *BA and others v Secretary of State for the Home Department [2012] EWCA Civ 944* .

35. In *Swaran* the judge was specifically commenting on the venue for commencing a claim. However, it is suggested that his comments apply with equal force to the venue in which a claim is continued following a change in circumstances which means that the unique jurisdiction of the Administrative Court is no longer required to resolve the issues in play. *R (DK) v SSHD* [2014] EWHC 3257 (Admin) was a claim which began whilst the claimant was detained but continued following his release. The judge noted at [4] that "*[f]ollowing [the Claimant's] release, there was an application for the matter to be*

transferred to the Queen's Bench List. However, exceptionally, this case was allowed to remain in the Administrative Court list because of the legal issues raised." Having said that, however, he went on draw attention at [5] to the "*pertinent general observations*" of Dingemans J in *Swaran* at [31]. The clear implication is that, in future, once a claimant is released, transfer will be the most appropriate course save where legal issues of unusual complexity or importance particularly suited to determination in the Administrative Court arise.

COSTS IN HARDIAL SINGH CHALLENGES

36. Whilst every case will turn on its own facts, two recent decisions involving claims in which a claimant secured release and succeeded in making good a damages claim under *Hardial Singh*, albeit for a shorter period than that for which the claimant contended, have resulted in 100% costs orders against the Secretary of State.

37. In *Belfken v SSHD* [2013] EWHC 4658 (Admin) the claimant sought release from detention and damages for false imprisonment for the whole of his detention from 18 March 2013 until the hearing on 18 September 2013. The claim was resisted in full. The judge found detention unlawful and ordered his release. He concluded that the claimant was entitled to substantial damages for only the final 37 days of his 6 month detention (at [20]). The SSHD conceded some liability in costs, proposing she pay 70%. The judge rejected this (see at [77]-[78]) stating (at [78]): "*It cannot be, in my judgment, even submitted on a tentative basis that the case would have been approached any differently had the claimant simply claimed unlawful detention from the middle of August.*" The claimant recovered his costs in full.

38. In *Rahman v SSHD* [2014] EWHC 1640 (Admin) the Court considered the approach to costs in similar circumstances, involving a longer period of detention. The Secretary of State had also argued that the Claimant's non-cooperation should be reflected in a reduced order for costs. The judge said this:

> [7] In these proceedings the Claimant sought his liberty and his release from detention and was successful in doing so as from the 13th September. In these circumstances he clearly was the successful party as at that date and is entitled to 100% of his costs up to that date.

> [8] Thereafter the claim continued as a claim for damages for unlawful detention. He succeeded in that claim in respect of the period from the 25th April 2013 to the 12th September 2013. I am satisfied that it was necessary for me to consider the whole period of detention before considering the application of the principles in Hardial Singh [1984] 1 WLR 704 in determining the reasonableness and lawfulness of the detention and that the case would not have been approached any differently and no significant extra work was caused by the claim relating to the whole of the period of detention. So I find myself in the same position as His Honour Judge William Davis QC (as he then was) in the case of Belfken [2013] EWHC 4658 (Admin) and I take the same approach, namely that the Claimant should recover his full costs. This case is to be distinguished from the case of He [2013] EWCA Civ 1846 where only nominal damages were to be recovered and even then the Secretary of State was ordered to pay 80% of the Claimant's costs.
>
> [9] I do not accept that the Claimant's lack of cooperation with the authorities justifies a reduction in the amount of his costs that the Defendant should pay. That may be relevant to the level of damages agreed or awarded: see NAB [2011} EWHC 1191 (Admin) at [18]. It is important that legal representatives acting on a publicly funded basis should obtain a proper order for costs so that as far as possible there remains an adequate pool of such lawyers: see AL (Albania) [2012] EWCA Civ 710 at [14].
>
> [10] Whether or not the Secretary of State was uncertain as to the outcome of these proceedings is a matter for her and her advisers and cannot justify a lesser award of costs where the Claimant has been successful in obtaining his release from detention and compensatory damages in proceedings which would have taken as long as they did and involved as much work whether the claim had been limited to the period of detention found to be unlawful or had been for the whole period of detention.

DETENTION IN THE PRISON ESTATE, AN UPDATE

39. There are currently (at least) two claims before the Administrative Court in which the claimants are arguing that, where detention *per se* was not unlawful, it was nevertheless a breach of Article 5 ECHR for the claimant to be held in a prison rather than an IRC, in the absence of any security or control concerns necessitating detention in prison. The first of these cases, *Idira v SSHD*, was heard yesterday, 9 December 2014, and judgment is awaited.

GRAHAM DENHOLM
LANDMARK CHAMBERS
10 December 2014